

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS

FILED

JAN 20 2016

CLERK, U.S. DISTRICT COURT
By _____ Deputy *[Signature]*

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

MUNDA MASSAQUOI, 24392-379,)	
Petitioner,)	
)	
v.)	3:14-CV-3787-N
)	3:11-CR-0308-N-7
UNITED STATES OF AMERICA,)	
Respondent.)	

**FINDINGS, CONCLUSIONS AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE**

This cause of action was referred to the United States Magistrate Judge pursuant to the provisions of Title 28, United States Code, Section 636(b), as implemented by an order of the United States District Court for the Northern District of Texas. The Findings, Conclusions and Recommendation of the United States Magistrate Judge follow:

I. Procedural background

Petitioner filed this petition for writ of habeas corpus pursuant to 28 U.S.C. § 2255. She challenges her conviction for conspiracy to commit health care fraud in violation of 18 U.S.C. §§ 371 and 1347. On June 28, 2013, the Court sentenced Petitioner to 37 months in prison and ordered her to pay \$286,410.03 in restitution. Petitioner did not file an appeal.

On October 20, 2014, Petitioner filed this petition for writ of habeas corpus pursuant to 28 U.S.C. § 2255.¹ Petitioner argues she received ineffective assistance of counsel when counsel

¹See *Spotville v. Cain*, 149 F.3d 374, 377 (5th Cir. 1998) (per curiam) (holding pro se habeas petition is filed when papers are delivered to prison authorities for mailing).

failed to investigate, failed to file appropriate motions and failed to challenge the conspiracy charge and amount of restitution.

On November 4, 2014, the Court ordered Petitioner to show cause why the petition should not be dismissed as barred by the one-year statute of limitations. Petitioner did not file a response. The Court now finds the petition should be dismissed as time barred.

II. Discussion

1. Statute of Limitations

The Antiterrorism and Effective Death Penalty Act of 1996 establishes a one-year statute of limitations for federal habeas proceedings. *See ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT*, Pub. L. 104-132, 110 Stat. 1214 (1996) ("AEDPA"). The statute provides that the limitations period shall run from the latest of:

- (1) the date on which the judgment of conviction becomes final;
- (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the Petitioner was prevented from filing by such governmental action;
- (3) the date on which the right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
- (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

See 28 U.S.C. § 2255.

In most cases, the limitations period begins to run when the judgment becomes final. *See 28 U.S.C. § 2255(1)*. Petitioner's conviction became final on July 12, 2013. *See FED. R. CRIM. P. 4(b)(1)(A)* (stating appeal must be filed within fourteen days of judgment). Petitioner then had

one year, or until July 12, 2014, to file her § 2255 petition. She did not file his petition until October 20, 2014. Her petition is therefore untimely.

2. Equitable Tolling

The one-year limitation period is subject to equitable tolling in "rare and exceptional cases." *Davis v. Johnson*, 158 F.3d 806, 811 (5th Cir. 1998); *see also Fisher v. Johnson*, 174 F.3d 710, 713 (5th Cir.1999) (asserting that courts must "examine each case on its facts to determine whether it presents sufficiently 'rare and exceptional circumstances' to justify equitable tolling" (quoting *Davis*, 158 F.3d at 811)). The Fifth Circuit has held that "[e]quitable tolling applies principally where the plaintiff is actively misled by the defendant about the cause of action or is prevented in some extraordinary way from asserting his rights.'" *Coleman v. Johnson*, 184 F.3d 398, 402 (5th Cir.1999) (quoting *Rashidi v. Am. President Lines*, 96 F.3d 124, 128 (5th Cir.1996)). Petitioner bears the burden of proof to show he is entitled to equitable tolling. *Phillips v. Donnelly*, 216 F.3d 508, 511 (5th Cir. 2000).

Petitioner has failed to claim that she is entitled to equitable tolting. She has also not shown rare and exceptional circumstances justifying equitable tolling in this case.

RECOMMENDATION:

For the foregoing reasons, the Court recommends that Petitioner's motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255 is DISMISSED as barred by the one-year statute of limitations.

Signed this 22 day of February 2016.


PAUL D. STICKNEY
UNITED STATES MAGISTRATE JUDGE

**INSTRUCTIONS FOR SERVICE AND
NOTICE OF RIGHT TO APPEAL/OBJECT**

A copy of this report and recommendation shall be served on all parties in the manner provided by law. Any party who objects to any part of this report and recommendation must file specific written objections within 14 days after being served with a copy. *See 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 72(b).* In order to be specific, an objection must identify the specific finding or recommendation to which objection is made, state the basis for the objection, and specify the place in the magistrate judge's report and recommendation where the disputed determination is found. An objection that merely incorporates by reference or refers to the briefing before the magistrate judge is not specific. Failure to file specific written objections will bar the aggrieved party from appealing the factual findings and legal conclusions of the magistrate judge that are accepted or adopted by the district court, except upon grounds of plain error. *See Douglass v. United Services Automobile Ass'n*, 79 F.3d 1415, 1417 (5th Cir. 1996).